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Nos. 07-984 and 07-990

IN THE
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA
Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONER COEUR ALASKA, INC.

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QUESTION PRESENTED

Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for discharges of "fill material" provided that the discharges comply with that section's water-quality requirements, which are jointly developed by the Corps of Engineers and the Environmental Protection Agency. 33 U.S.C. § 1344(a), (b)(1). By regulation, the Corps of Engineers and EPA have jointly defined "fill material" generally as any material that has the net effect of raising the bottom elevation of a water of the United States, including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)–(f); 40 C.F.R. § 232.2.

In this case, the Ninth Circuit held that the Corps of Engineers lacked authority under Section *404* to issue a permit for the discharge of fill material whenever the discharge implicates any effluent restriction promulgated by EPA as part of its permit program under Section *402* of the Act. On that basis, the Ninth Circuit invalidated a Section 404 discharge permit issued to Petitioner Coeur Alaska, Inc.

The question presented is whether the Ninth Circuit erred in rejecting the expert agencies' joint interpretation of the Act that effluent restrictions promulgated as part of EPA's Section 402 permit program do not apply to discharges of fill material permitted by the Corps of Engineers under Section 404.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to Southeast Alaska Conservation Council, the Sierra Club and Lynn Canal Conservation were appellants in the court of appeals. In addition to Coeur Alaska, Inc. and to the State of Alaska, which is the petitioner in No. 07-990, the following parties (or their predecessors in office, *see* this Court's Rule 35.3) were appellees in the court of appeals and are respondents in this Court pursuant to this Court's Rule 12.6: the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); the United States Forest Service; and Goldbelt, Inc.[1]

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

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[1] Kevin J. Wilson replaced Timothy J. Gallagher as District Engineer, Michael Rabbe replaced Larry L. Reeder as Chief of the Regulatory Branch, and George S. Dunlop replaced Dominic Izzo as Principal Deputy Assistant Secretary of the Army (Civil Works).

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BRIEF FOR PETITIONER COEUR ALASKA, INC.

OPINIONS BELOW

The court of appeals' opinion is reported at 486 F.3d 638. J.A. 517a. The order denying the petition for rehearing en banc is unreported. *Id.* 552a. The court of appeals' order granting respondents' emergency motion for an injunction pending the appeal is unreported, *id.* 509a, as is its order denying Coeur Alaska's motion to vacate that injunction, *id.* 511a. The opinion of the United States District Court for the District of Alaska is also unreported. *Id.* 478a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on May 22, 2007, and it denied, on October 29, 2007, the timely filed petition for rehearing en banc of Coeur Alaska, Inc. ("Coeur"). Coeur's petition for a writ of certiorari was filed on January 28, 2008, and granted on June 27, 2008, along with the related petition of the State of Alaska. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The text of the pertinent provisions of the Clean Water Act, 33 U.S.C. §§ 1257–1387, and the regulations interpreting and administering the Act are set out in an appendix to this brief, *infra*, at 1a. *See* S. Ct. R. 24.1(f). The pertinent provisions are: 33 U.S.C. §§ 1311, 1316, 1342, and 1344; 33 C.F.R.

§ 323.2; and 40 C.F.R. §§ 122.3, 232.2, 401.11, 434.10, 440.102, and 440.104.

STATEMENT

1. Section 301 of the Clean Water Act broadly prohibits the discharge of pollutants into navigable waters of the United States "[e]xcept as in compliance with" certain of its provisions, including Sections 301, 306, 402, and 404. 33 U.S.C. § 1311(a). Section 402 authorizes EPA to "issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). Discharges that fall under Section 402—also known as the National Pollution Discharge Elimination System ("NPDES") program—must meet "all applicable requirements" under Sections 301, 306, and several other provisions of the Clean Water Act. *Id.* Section 301(e) requires compliance with "[e]ffluent limitations" applicable to existing point sources, *id.* § 1311(e), while Section 306(e) applies more stringent effluent restrictions, known as "standards of performance," to new point sources, *id.* § 1316(e). These effluent restrictions are promulgated in the form of regulations issued by EPA. The Section 402 NPDES permit scheme applies to all discharges into the navigable waters "[e]xcept as provided in section[] . . . [404]." 33 U.S.C. § 1342(a)(1).

Section 404 of the Clean Water Act entrusts to the Corps of Engineers the authority to "issue permits . . . for the discharge of . . . fill material into the navigable waters." 33 U.S.C. § 1344(a); *see also id.* § 1344(d). Discharges of fill material governed by Section 404 must satisfy water-quality requirements (known as Section 404(b)(1) guidelines) developed by EPA, in consultation with the Corps, under criteria established by Congress. *Id.* § 1344(b) (cross-referencing criteria in 33 U.S.C. § 1343(c)). More-

over, Section 404(c) provides an additional protection for water quality by stating that EPA may veto any permit the Corps proposes to grant. *Id.* § 1344(c). Section 404 does not, however, require compliance with effluent limitations or standards of performance promulgated by EPA under its Section 402 NPDES permit program. Indeed, the only references in Section 404 to either Section 301 or Section 306 are two provisions—Section 404(f) and Section 404(r)—that state that certain discharges of fill material are "not prohibited by or otherwise subject to regulation" under Section 301, and another—Section 404(p)—that states that compliance with a Section 404 discharge permit "shall be deemed compliance" with Section 301. 33 U.S.C. § 1344(f), (p), (r). Section 306 is not mentioned at all.

The division of labor Congress prescribed in Sections 402 and 404 makes sense. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,293 (Apr. 20, 2000). The Section 402 program focuses on "water quality standards for the receiving water" and controls pollutant discharges "principally through the imposition of effluent limitations, which are restrictions on the 'quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters.'" *Id.* "Fill material," on the other hand, "differs fundamentally from the types of pollutants covered by section 402 because the princi-

pal environmental concern is the loss of a portion of the water body itself." *Id.* "The term 'fill material' clearly contemplates material that fills in a water body." *Id.*

Consistent with Congress's intention to make these permitting regimes mutually exclusive, *see* 33 U.S.C. § 1342(a) ("Except as provided in section[] . . . [404]"), EPA has long provided that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require [EPA] NPDES permits" under Section 402 of the Act. 40 C.F.R. § 122.3(b) (promulgated at Environmental Permit Regulations, 48 Fed. Reg. 14,153, 14,157–58 (Apr. 1, 1983)); *see also* 40 C.F.R. § 125.4(d) (1973) (earlier regulation providing that "fill material discharged into navigable waters" does "not require an NPDES permit"). Both EPA and the Corps, moreover, have affirmed that "EPA has never sought to regulate fill material under effluent guidelines." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002).

Because the term "fill material" is not defined by the Clean Water Act, these agencies, acting within the discretion delegated to them by Congress, issued a joint regulation (the "Fill Rule") to "determine[] the basic jurisdiction of the section 404 versus the section 402 program." Final Revisions, 67 Fed. Reg. at 31,133. EPA and the Corps chose to define the Fill Rule's "key jurisdictional terms" by using an "objective, effects-based test that ensures consistent treatment of like discharges" and that "prevents uncertainty for the regulated community as to what regulatory program applies to particular discharges." *Id.*; *see also* Proposed Revisions, 65 Fed. Reg. at

21,293 ("Providing a clear and consistent definition for the term 'fill material' . . . is important in determining whether a proposed discharge of a pollutant is subject to regulation under section 404 or section 402.").

In the Fill Rule, the agencies defined "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii); 40 C.F.R. § 232.2. The agencies further provided that the term "discharge of fill material" "generally includes . . . placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

The discharge at issue in this case is the placement of mine tailings, transported as a slurry, into Lower Slate Lake in southeastern Alaska, where, all agree, the tailings would "raise the bottom elevation of the lake by 50 feet." J.A. 519a.

2. The Kensington Gold Mine is located about 45 miles north of Juneau, Alaska, at the site of a mine previously operated from 1897 to 1928. Coeur's plan of operations for reinvigorating the mine provides for conventional milling of ore on site through a "froth-flotation" process that separates valuable ore from the remaining minerals. Under this process, crushed ore is fed into flotation tanks where air, conditioners, and frothing agents cause gold-bearing minerals to attach to air bubbles and float to the top of the tank. The gold-bearing froth is then skimmed off and further concentrated in additional flotation tanks. Most of the chemicals added in the froth-flotation process and most other metals naturally occurring in the gold-bearing ore will be removed with the froth con-

centrate or will remain in the flotation tanks. J.A. 481a–82a, 191a.

The remaining tailings—finely ground, solid material resembling wet sand, C.A. E.R. 77[1]—will then be removed from the flotation tanks and, after the addition of settling agents that "are not toxic and are expected to have no effect on water quality other than the benefit of enhancing the settling of the fine material," J.A. 482a n.15, transported in a slurry form via a 3.5-mile pipe into a secure impoundment in Lower Slate Lake. Over the 10- to 15-year life of the project, the mill processing operations will yield a great deal of valuable ore, but also several million tons of mine tailings. Approximately 40 percent of the tailings can be backfilled into the mine. *Id.* 520a. Coeur proposed disposing of the remainder—up to 4.5 million tons—by placing them into a carefully designed impoundment in Lower Slate Lake. Coeur also developed a reclamation plan designed to restore the lake's fish population at the close of operations. J.A. 249a. Because the largely solid mine tailings constitute "fill material" (the tailings indisputably would "[c]hang[e] the bottom elevation" of the lake, 33 C.F.R. § 323.2(e)(1)(ii)), Coeur sought a permit from the Corps under Section 404.

The Corps thoroughly considered both Coeur's proposed discharge and several alternative methods of tailings storage. After taking into account the input of several other agencies (including Environmental Impact Statements prepared by the Forest Service in cooperation with the Corps, EPA, and the

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[1] "C.A. E.R." refers to the Excerpts of Record filed in the court of appeals. "C.A. J.S.E.R." refers to the Joint Supplemental Excerpts of Record also filed in the court of appeals.

Alaska Department of Natural Resources, and a Record of Decision by the Forest Service), the Corps ultimately approved the use of a tailings impoundment in the Lower Slate Lake. The Corps' Record of Decision concluded that the tailings impoundment was "the least environmentally damaging practicable alternative." J.A. 366a. The Corps also determined that the principal alternative proposal, storing the mine tailings in a dry tailings facility, would be "more damaging" than depositing them in Lower Slate Lake because upland disposal would cause a "permanent loss of wetland[s]" that would "outweigh[] the temporary losses to the lake." *Id.* Evaluating Coeur's proposed discharge, the Corps concluded that it satisfied the Section 404(b)(1) water-quality requirements promulgated by EPA in consultation with the Corps. By granting the Section 404 permit, which incorporated numerous protective requirements under Section 404(b)(1) guidelines, the Corps authorized Coeur to discharge tailings into Lower Slate Lake. *Id.* 266a–86a.

The Alaska Department of Environmental Conservation certified that the proposal would comply with Section 401 of the Act and with Alaska's water-quality standards. J.A. 368a. Recognizing the clear fill effect of the tailings discharge into the Lower Slate Lake impoundment, EPA concurred with the Corps that Section 404 was the applicable permitting regime, that, accordingly, Section 301 and Section 306 effluent restrictions did not apply, and that Coeur's proposed discharge satisfied EPA's Section 404(b)(1) water-quality requirements. After reviewing multiple analyses and working with the Corps to resolve environmental concerns, EPA concurred in the Corps' issuance of the permit, declining to exercise its ultimate veto authority under Section 404(c).

EPA also issued a Section 402 permit, incorporating standards of performance promulgated under Section 306, to govern the subsequent discharge of effluent from the lake impoundment into the small adjacent creek leading to more substantial downstream waters. J.A. 287a, 292a, 317a.

3. Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") sued the Corps of Engineers and the Forest Service, arguing that the issuance of Coeur's Section 404 permit for the discharge of fill material violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), and Sections 301(a), 301(e), and 306(e) of the Clean Water Act. SEACC relied on an EPA regulation that states that "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores," 40 C.F.R. § 440.104(b)(1), and argued that this "no discharge" performance standard (promulgated under Section 306) precluded any disposal of mine tailings under a Section 404 permit.

SEACC alternatively challenged the agencies' construction of their own joint regulatory definition of "fill material," arguing that it was arbitrary and capricious to construe the term "discharge of fill material"—a term which the Fill Rule explicitly provides "includes . . . placement of . . . slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2—to include the proposed Kensington mine tailings slurry. J.A. 475a ¶ 72. SEACC did not challenge the validity of the Fill Rule itself or its definition of Section 404's ambiguous statutory term "fill material." Rather, it rested its argument on the contention that the Fill Rule could

not reasonably be interpreted to apply to Coeur's particular discharge of mine tailings.

After Coeur, the State of Alaska, and Goldbelt intervened in defense of the Corps' issuance of the Section 404 permit, the district court granted the defendants' motion for summary judgment and upheld the permit, holding that "[t]he Corps properly issued the permit to Coeur Alaska, Inc. under § 404." J.A. 495a. The district court recognized that the Clean Water Act "divides the permitting process into two segments" and that different standards apply under Sections 402 and 404, *id.* 490a–91a; accordingly, the district court concluded that "[i]f the permit was properly issued under § 404, [the effluent limitations of Sections 301(e) and the standards of performance of 306(e)] are inapplicable," *id.* 488a n.35. The district court also rejected SEACC's argument that statements in the regulatory history rendered unreasonable the agencies' interpretation of their own Fill Rule to permit a discharge that "facially falls within the definition of 'fill material' contained in the regulations." *Id.* 492a.

4. The Ninth Circuit issued an emergency injunction pending appeal, J.A. 509a–10a, and thereafter reversed the judgment of the district court and invalidated Coeur's Section 404 permit. The court of appeals concluded that the Corps, by issuing a permit to Coeur for a discharge that "facially meets the Corps' current regulatory definition of 'fill material,'" *id.* 526a, and that "facially qualif[ies] for permitting under § 404," *id.* 531a, had nevertheless "violated the Clean Water Act," *id.* 550a.

The court of appeals purported to base its conclusion on "the plain language of the Clean Water Act." J.A. 526a. The court contended that Section 301(a)

"prohibits all discharges of any pollutant . . . except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404." *Id.* 527a–28a. Relying on Section's 301's "use of 'and' as a connector," the court concluded that "§ 301(a) prohibits *any* discharge that does not comply with . . . both § 301 and § 306, as well as § 402 and § 404." *Id.* 531a. Thus, the court concluded that "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." *Id.* 533a. "[T]he NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for [such] discharges." *Id.* 533a–34a.

The court also argued that the use of "all" and "any" in Sections 301(e) and 306(e) meant that effluent restrictions promulgated by EPA applied to all discharges, even those permitted by the Corps under Section 404. J.A. 531a. The Ninth Circuit reached that conclusion despite the fact that discharges permitted by Section 404 must comply with a different set of EPA water-quality standards—the Section 404(b)(1) guidelines.

The court also proffered an alternative holding that, even though Coeur's proposed discharge "facially meet[s] the definition of the term 'fill material,'" J.A. 538a, the "regulatory history" nonetheless demonstrated that the Corps had unreasonably interpreted its own regulation as encompassing Coeur's discharge. *Id.* 535a. The regulation's plain language notwithstanding, the panel concluded that the regulation must be interpreted to include "only . . . those tailings and other mining-related materials

that are not subject to effluent limitations or standards of performance." *Id.* 546a.

5. The court of appeals denied rehearing, J.A. 553a, but, on Coeur's motion, stayed its mandate pending review by this Court. *Id.* 554a. After granting the stay, however, the court of appeals issued another order, this time on SEACC's motion, to require Coeur, the Corps, and the Forest Service to prepare and approve a reclamation plan by April 1, 2008. *Id.* 555a.

SUMMARY OF ARGUMENT

Even though Section 404 of the Act broadly authorizes the Corps of Engineers—and only the Corps of Engineers—to issue permits "for the discharge of . . . fill material," 33 U.S.C. § 1344(a), and even though the joint EPA-Corps Fill Rule—unchallenged here—defines "fill material" generally as any material that has the net effect of raising the bottom elevation of a navigable water (including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(f)), the Ninth Circuit held that the Corps lacks authority to issue a permit for the discharge of fill material whenever the proposed discharge implicates any of the hundreds of effluent restrictions promulgated by EPA. The Ninth Circuit offered two alternative rationales for its conclusion, and both are clearly erroneous.

I. The Ninth Circuit first held that, in issuing a Section 404 permit to Coeur for the discharge of fill material, the Corps contravened the text of the Clean Water Act. On the Ninth Circuit's view, the Act requires that, if an EPA effluent restriction could conceivably be applied to a discharge (even a discharge of fill material), it may be permitted only under EPA's Section 402 NPDES program. Section 404,

however, gives the Corps a clear mandate and unambiguous instructions with respect to the issuance of permits for the discharge of fill material, and there is no dispute here that the Corps followed the commands of Section 404 to the letter. After the Corps, EPA, the Forest Service, and several other federal and state agencies reviewed the effects of Coeur's proposed discharge, the Corps applied EPA's Section 404(b)(1) water-quality requirements and found them satisfied. EPA concurred, finding no basis to invoke its authority under Section 404(c) to veto the Corps' decision to issue an permit.

But Section 404 played no role whatsoever in the Ninth Circuit's analysis of the Corps' permitting authority. It instead concluded that, whatever the Corps' authority under Section 404, Section 301(a) and Section 306(e) of the Act precluded the Corps from issuing a permit for Coeur's proposed discharge. But statutory interpretation is a "holistic endeavor," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988), and the Ninth Circuit's construction of those two subsections cannot be reconciled with the whole of the Clean Water Act.

The Ninth Circuit read Section 301(a) as requiring—because it uses the word "and"—that every discharge into jurisdictional waters comply with both Section 301 *and* Section 306, as well as both Section 402 *and* Section 404. That reading of the conjunction, however, disregards the fact that it conjoins two pairs of mutually exclusive provisions: Section 301 applies to existing sources, while Section 306 applies only to new sources, and Section 404 applies only to fill material, while Section 402 applies to "any pollutant" "[e]xcept as provided in section[] . . . [404]." 33 U.S.C. § 1342(a). In that statutory context, "and"

can be sensibly construed only as a disjunctive. The Ninth Circuit seemed to admit as much when it treated the Section 402 NPDES program and the Corps' Section 404 program as mutually exclusive permitting alternatives.

The Ninth Circuit also contended that, because EPA has promulgated a standard of performance applicable to froth-flotation mining operations, Section 306(e), which makes it "unlawful for any . . . operator of any new source to operate such source in violation of any standard of performance applicable to such source," 33 U.S.C. § 1316(e), precluded the Corps from permitting Coeur's discharge of fill material. Buried in the Ninth Circuit's reasoning is an assumption that effluent restrictions promulgated by EPA under Section 301 and Section 306 apply to discharges of fill material, but reading the statute as a whole demonstrates that they do not. Section 404 specifically enumerates the water-quality requirements that apply to discharges of fill material and, in vivid contrast to Section 402, does not require compliance with EPA effluent restrictions. Congress's affirmative decision to impose different standards under Sections 404 and 402 must be given effect. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006). Moreover, if, as the Ninth Circuit stated, Sections 301(e) and 306(e) are "blanket prohibitions" that apply broadly and generally to "*all*" and "*any*" discharges, and Section 404 is a "limited" program that applies "only to dredged or fill material," J.A. 530a–32a, then, to the extent that the general rules of Sections 301(e) and 306(e) conflict with the specific rules of Section 404, Section 404's specific rules would control. *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002).

II. Backstopping its tendentious reading of isolated provisions of the Act, the Ninth Circuit held, in the alternative, that the Corps unreasonably interpreted its own regulation when it concluded that Coeur's proposed discharge of mine tailings fell within the regulatory definition of "fill material" set out in the joint EPA-Corps Fill Rule. Although the Ninth Circuit conceded that Coeur's proposed placement of tailings "facially meets" the Fill Rule's definition of "fill material," J.A. 526a, after reviewing the "regulatory history" the Ninth Circuit concluded, the text of the Fill Rule notwithstanding, that EPA and the Corps did not intend to include within their definition of "fill material" discharges that otherwise could be covered by an EPA effluent restriction. This Court has held, however, that an agency's construction that is consistent with plain *statutory* language "simply cannot be found 'sufficiently unreasonable' as to be unacceptable," *United States v. Locke*, 471 U.S. 84, 96 (1985), and this rule applies with even greater force when, as here, the agency is interpreting not a statute, but a *regulation* it wrote. And while the text of the Fill Rule is dispositive of any question concerning the reasonableness of the Corps' application of the regulation to Coeur's proposed discharge, the regulatory history further demonstrates that the Fill Rule applies to "*any* mining-related material that has the effect of fill when discharged," Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added), not, as the Ninth Circuit held, to "*only* . . . mining-related materials . . . not subject to effluent limitations," J.A. 546a (emphasis added). Indeed, the relevant "history" is that "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

In a case in which the validity of the Fill Rule was unchallenged, the Ninth Circuit effectively rewrote the regulation. It scrapped the jurisdictional line drawn by Congress in Section 404(a)—and clearly defined with objective criteria by the agencies in the Fill Rule—and replaced it with its own policy: an outright grant of primary jurisdiction to EPA, under which EPA regulates whatever discharges it chooses and the Corps regulates "fill material" only to the extent that EPA chooses not to do so. That is not what either Congress or the agencies intended. The decision of the court of appeals should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING THAT COEUR'S SECTION 404 DISCHARGE PERMIT VIOLATES THE CLEAN WATER ACT IS PLAINLY ERRONEOUS

The Clean Water Act protects the "chemical, physical and biological integrity of the Nation's waters" by permitting discharges into jurisdictional waters only if they comply with certain provisions of the Act. 33 U.S.C. §§ 1251 & 1311(a). The expert agencies tasked by Congress with applying the Act's two principal permitting regimes agree that the discharge at issue in this case falls squarely within the Section 404 program as a discharge of fill material. That conclusion could be rejected only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and to reach that result the Ninth Circuit announced an entirely novel construction of the Act: Effluent restrictions applicable under Section 402's general NPDES permit program henceforth would also apply to Section 404 permits, which govern specifically—

and only—discharges of fill material. The court's decision ignores the regulatory scheme of the Act, divorces particular terms from their context, and reads general provisions as trumping specific provisions. The court's decision cannot be reconciled with the Act or this Court's precedents.

A. The Corps Appropriately Issued A Section 404 Permit To Coeur For Its Discharge Of Fill Material

Section 404 of the Clean Water Act authorizes the Corps of Engineers to "issue permits . . . for the discharge of . . . fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). As the Ninth Circuit acknowledged, "[t]he Clean Water Act does not define the term 'fill material,'" J.A. 538a, and therefore the Corps and EPA, the two agencies responsible for the administration of the Clean Water Act, jointly defined the term after notice and comment. Neither SEACC nor the Ninth Circuit disputes the agencies' authority to interpret the undefined and ambiguous statutory term "fill material," nor do they dispute that the joint EPA-Corps definition of "fill material" is reasonable. J.A. 541a n.12 (explaining that because SEACC attacked only the Corps' application of its Fill Rule, and not the Fill Rule itself, "we do not reach the issue of the validity of these regulations"). As the agencies explained when promulgating the Fill Rule, the definitions provide an "objective effects-based test" that "determines the basic jurisdiction of the section 404 versus the section 402 program," "ensures consistent treatment of like discharges," and "prevents uncertainty for the regulated community as to what regulatory program applies to particular discharges." Final Revisions, 67 Fed. Reg. at 31,133. Under this jurisdic-

tional division, "EPA has never sought to regulate fill material under effluent guidelines." *Id.* at 31,135.

In their joint regulation, the agencies defined "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii) (Corps); 40 C.F.R. § 232.2 (EPA). They further defined "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f) (Corps); 40 C.F.R. § 232.2 (EPA).

The proposed discharge in this case falls squarely within these definitions: The district court noted that "it is uncontested that the slurry to be discharged into Lower Slate Lake will 'change the bottom elevation' of the lake," J.A. 492a, and the Ninth Circuit agreed that "[t]he discharge . . . facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," *id.* 526a. Indeed, the Ninth Circuit acknowledged that Coeur's proposed discharge of mine tailings will raise the bottom elevation of Lower Slate Lake by *50 feet*. *Id.* 519a.

Relying on Section 404 and on the Fill Rule's reasonable regulatory interpretation of that statute, both of which grant primary jurisdiction over discharges of fill material to the Corps, Coeur applied in 2001 to the Corps for a permit under Section 404 for its proposed tailings discharge into Lower Slate Lake, as part of an amended plan of operations for the Kensington Mine Project. J.A. 210a. Although the mine project had already undergone, in the words of the Corps in 1998, "intense public and

agency scrutiny for eight years," C.A. E.R. 255, Coeur's amended plan of operations and Section 404 permit application underwent another five years of agency review.

According to Corps regulations, applications for any type of permit from the Corps (including a Section 404 permit) must undergo (1) a public interest review; (2) an analysis of the proposal's effect on wetlands, which may include review by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service; (3) a fish and wildlife analysis; (4) a water-quality review; (5) an evaluation of historic, cultural, scenic, and recreational values; (6) a review of other federal, state, or local requirements; (7) an evaluation of the safety of impoundment structures; (8) consideration of any environmental benefits from the proposal; (9) a review of the proposal's economic impact; and (10) an analysis of any mitigating steps taken by the permittee. 33 C.F.R. § 320.4; *see also id.* § 323.6. In addition, applicants for a Section 404 permit must comply with the water-quality requirements of Section 404(b)(1), which address potential impacts on the physical and chemical characteristics of the aquatic ecosystem, on special aquatic sites (including wetlands), and on human use and which consider how to minimize any adverse effects from the proposal. 40 C.F.R. pt. 230. Coeur's amended plan of operations satisfied all of these requirements.

The review of Coeur's amended plan of operations began when the Forest Service, in cooperation with the Corps, EPA, and the State of Alaska, held public meetings and then prepared a Supplemental Environmental Impact Statement (to update prior statements prepared in 1992 and 1997). J.A. 210a–11a, 228a–29a. The agencies made a draft of the

Environmental Impact Statement available for public comment, and held additional public meetings to discuss it. *Id.* 230a. The Forest Service also prepared a Record of Decision for the mining project, addressing the Lower Slate Lake tailings facility and other project components and environmental issues. J.A. 207a–48a. The Corps conducted its own review of the project, aided by these Environmental Impact Statements, by the more than 900 individual reports that, at a cost of $26 million, have examined the potential environmental impact of the Kensington mine project, C.A. J.S.E.R. 800, and by public comments, including comments from public hearings in Alaska about the proposed permit. J.A. 369a. In addition to comments from the general public, the Corps considered comments from EPA, the National Marine Fisheries Service, other agencies, and from SEACC, *id.* 369–70a; *see also* C.A. J.S.E.R. 883, 888, 899. In response to these comments, Coeur agreed to take additional steps to protect water quality: For example, Coeur agreed to construct a reverse osmosis treatment facility for discharges from the lake impoundment into an outflowing creek and to use methods, such as silt screens, to confine suspended particles and turbidity to a small area in the lake. C.A. J.S.E.R. at 878, 880; *see also* J.A. 276a, 280a.

Evaluating the proposed discharge under the Section 404(b)(1) guidelines, the Corps determined that the proposed discharge would not violate State water-quality standards or toxic effluent standards (under Section 307 of the Act) and would not jeopardize endangered or threatened species or their critical habitat; the Corps also concluded that the discharge would not cause adverse impacts to human health or welfare, to the diversity, productivity, and stability of aquatic life and other wildlife or wildlife habitat, or

to recreational, aesthetic, and economic values. J.A. 384a–86a.

In accordance with Section 7 of the Endangered Species Act, the National Marine Fisheries Service reviewed the project, referring to the Forest Service's Supplemental Environmental Impact Statement, a biological assessment, and other studies. C.A. E.R. 478. After consulting with the Corps and the Forest Service, the Fisheries Service issued a Biological Opinion concluding that the project was not likely to jeopardize the continued existence of covered species or to adversely modify designated critical habitat. *Id.* The Alaska Department of Natural Resources similarly concurred that the project was consistent with the Alaska Coastal Management Plan. J.A. 369a. The Alaska Department of Environmental Conservation issued a certificate that the project would comply with Alaska's water-quality standards and program under Section 401 of the Act. *Id.* 368a.

Finally, in 2005, after Coeur submitted its final plan of operations and also a reclamation and closure plan, the Corps approved the Section 404 permit. J.A. 266a, 249a. EPA also issued a Record of Decision and a Section 402 permit to govern discharges *from* the tailings impoundment into downstream waters. J.A. 287a, 317a. In response to the initial filing of this lawsuit, the Corps further evaluated the project and, in 2006, issued a revised Record of Decision and reissued the Section 404 permit, again concluding that Section 404 was the appropriate permitting scheme and that its requirements had been satisfied. J.A. 342a.

In short, numerous state and federal agencies reviewed Coeur's proposal and its expected effects, *see, e.g.*, J.A. 227a–28a, and Coeur met every re-

quirement imposed by Section 404 and every additional requirement of the Corps, EPA, and other agencies participating in the permitting process. Following this comprehensive review, the Corps granted the Section 404 permit. J.A. 266a. As the issuance of the permit demonstrates, both the Corps and EPA agreed that the discharge of mine tailings into Lower Slate Lake was a permissible discharge of fill material under Section 404 of the Clean Water Act. In this case, SEACC challenged *none* of these agency findings except to contend that effluent restrictions promulgated by EPA under Sections 301 and 306 as part of its Section *402* permit program apply to discharges of fill material governed by Section 404 and, here, prohibit Coeur's proposed disposal of tailings.[2]

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[2] The Ninth Circuit alleged that the agencies "consistently informed Coeur Alaska that discharges from its froth-flotation mill would not be regulated as fill material under § 404." J.A. 546a. This erroneous version of the mine's history is based on three out-of-context quotations. First, the court cited a 1998 record of decision as stating that the Corps "'does not regulate the placement of tailings,'" *id.* 547a; *see also* C.A. E.R. 257, but it ignored the context: The proposal called for putting the tailings in a dry tailings facility (i.e., on dry land), not in a water of the United States. *See* C.A. E.R. 257. Second, the Ninth Circuit's statement that EPA informed Coeur Alaska in 2005—after the Section 404 permit was issued, J.A. 547a, 523a—that the froth-flotation performance standard applies to the mine is similarly off-point, *id.* 547a (citing a record of decision "for § 402 NPDES Permit"); *see also* J.A. 291a, for that statement applied to "the proposed discharge *from* the tailings storage facility (TSF) in Lower Slate Lake," J.A. 292a (emphasis added), which is subject to a separate Section 402 permit, not to the proposed tailings discharge *into* Lower Slate Lake, which is the subject of this case. Third, the court's reliance on a statement by a district engineer, J.A. 539a n.10, is misplaced because that memo-

[Footnote continued on next page]

B. The Ninth Circuit Incorrectly Held That The Corps' Permit Violated Sections 301 and 306 of the Clean Water Act

The Ninth Circuit held that the Corps' issuance of a discharge permit "violate[d] § 301 and § 306 of the Clean Water Act." J.A. 550a. The court of appeals reached this holding first by reading the word "and" in Section 301(a) to require compliance with mutually exclusive provisions and then by reading Sections 301(e) and 306(e) as applying even to discharges of fill material governed by Section 404. Thus, the Ninth Circuit concluded, the Corps lacks authority to grant a permit for a discharge that facially qualifies as "fill material" under Section 404 whenever "EPA has adopted an effluent limitation or performance standard applicable" to the discharge. *Id.* 533a. The Ninth Circuit's analysis, however, disregarded the structure of the Act and eschewed well-established rules of interpretation.

1. To demonstrate that EPA's effluent restrictions apply to discharges of fill material, the Ninth Circuit locked onto the word "and" in Section 301(a). The court of appeals argued that "[t]he use of 'and' as a connector, instead of 'or,'" in Section 301(a) "indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for

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randum merely sought "to elevate to the Washington level" a jurisdictional dispute, C.A. E.R. 176, and the response from Washington directed that "the potential impacts of the discharge of mine tailings must be considered[] within the context of the section 404 permit evaluation," C.A. J.S.E.R. 1062.

permitting under § 404." J.A. 531a; *see also id.* 528a (quoting Section 301(a) with emphasis on the word "and"). Because of this "and," every discharge, in the Ninth Circuit's view, must "comply with several enumerated sections, including both § 301 and § 306, as well as § 402 and § 404." *Id.* 531a. But "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Here, the Ninth Circuit's reading of the word "and" cannot be reconciled with the whole of the Clean Water Act.

Context demonstrates that Section 301(a) cannot be read to require that all discharges comply with "both § 301 and § 306" and with their "effluent limitations and standards of performance." J.A. 531a. The text of Section 306(e) states that only "new" sources—not existing ones—need comply with standards of performance. 33 U.S.C. § 1316(e). As this Court explained shortly after the passage of the Clean Water Act, Section 306 provides for the establishment of "standards of performance for *new* sources," while "Section 301(b) defines the effluent limitations that shall be achieved by *existing* point sources." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 120–21 (1977) (emphases added). EPA also interprets these provisions as applying only in the alternative, clarifying in a regulation that effluent limitations under Section 301(e) apply only to "point sources[] *other than new sources*." 40 C.F.R. § 401.11(i) (emphasis added). In fact, even the Ninth Circuit contradicted itself by recognizing that pollutant discharges are "subject to an effluent limitation under § 301 *or* a standard of performance under § 306." J.A. 534a (emphasis added).

Nor does context permit the word "and" in Section 301(a) to require, as the interpretation of the Ninth Circuit suggests, that one must obtain permits under both Section 402 *and* Section 404 for the same discharge. The plain text of Section 402 makes clear that it applies only when Section 404 does not. 33 U.S.C. § 1342(a)(1) ("Except as provided in . . . [Section 404]"). This Court recently recognized that Section 402 and Section 404 are mutually exclusive permitting schemes. *See Rapanos v. United States*, 547 U.S. 715, 744 (2006) (plurality opinion) (contrasting "pollutants normally covered by the permitting requirement of [Section 402(a)]" with "'dredged or fill material'" and explaining that "[t]he Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)]"); *id.* at 760 (Kennedy, J., concurring) ("*Apart from* dredged or fill material, pollutant discharges require a permit from [EPA], which also oversees the Corps' . . . permitting decisions.") (emphasis added). Numerous courts of appeals have similarly acknowledged this mutual exclusivity. *See, e.g.*, *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004) ("[A] defendant who wishes to discharge a pollutant must first obtain a permit *either* under [Section 404] for the discharge of dredged or fill material *or* under [Section 402] for other pollutants.") (emphases added).[3]

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[3] *See also Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003) (recognizing that "cross-references, exclusions, and vetoes" interlocking Sections 404 and 402 "reinforc[ed] the fill-effluent distinction that has been followed by the agencies").

Both agencies charged with administering the two permitting schemes agree that Section 301 requires compliance with only "one of the two permitting programs." Final Revisions, 67 Fed. Reg. at 31,130. Indeed, since 1973, EPA has recognized that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require NPDES permits." 40 C.F.R. § 122.3(b); 40 C.F.R. § 125.4(d) (1973). *SEACC itself* acknowledged below the mutual exclusivity of these two sections. SEACC C.A. Br. 24 ("The Act provides that a single discharge will be governed by either section 402 or section 404, but not both."). And in the end, even the Ninth Circuit could not accept the logical conclusion of its own reading of "and": It did not require that Coeur comply with both "§ 402 and § 404," J.A. 531a, but instead held that "§ 402 is the only appropriate permitting mechanism" for discharges subject to an effluent limitation, *id.* 533–34a.

This Court has long recognized that "courts are often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.'" *United States v. Fisk*, 70 U.S. 445, 447 (1866); *see also Slodov v. United States*, 436 U.S. 238, 246–48 (1978) (interpreting "and" as "or" to avoid a result "obviously at odds with the statute's purpose"). This is a corollary to the more general rule that courts may not "take out of a statute a single word susceptible of different meanings[] and expound it without reference to the context." *Perrine v. Chesapeake & Del. Canal Co.*, 50 U.S. 172, 190 (1850). When the word "and" "conjoins a list of mutually exclusive alternatives," "context *requires* the term to be construed disjunctively." *Officemax, Inc. v. United States*, 428 F.3d 583, 591 (6th Cir. 2005) (Sutton, J.) (emphasis added).

Section 301(a) need not be construed to require every discharge to comply with mutually exclusive provisions—with Sections 301 *and* 306, and with Sections 402 *and* 404. Indeed, the *only* sensible construction of Section 301(a) is as a list of each of the provisions of the Act that regulate discharges into jurisdictional waters and a prohibition on discharges "[e]xcept as in compliance with" those regulatory provisions applicable to the particular discharge. Accordingly, this Court in *Du Pont* did not consider all sections listed in Section 301(a) as applicable to the discharge of effluent then before the Court, but instead considered only Sections 301, 306, and 402 as "relevant to [the] case." 430 U.S. at 119 (making no mention of Section 404).

2. The Ninth Circuit's conclusion that the Corps' Section 404 permit violated Sections 301(e) and 306(e) of the Act is just as flawed, contravening both the structure and the history of the Act.

a. The structure of the Act demonstrates that Sections 301 and 306 do not apply to discharges permitted under Section 404. Section 404 requires compliance with Section 404(b)(1) water-quality requirements, guidelines developed by EPA in consultation with the Corps, based on criteria specifically designated by Congress. *See* 33 U.S.C. § 1344(b) (requiring EPA guidelines to be "based upon criteria comparable to the criteria applicable . . . under [Section 403(c) of the Act]"). Section 404 makes no mention of Section 301(e)'s effluent limitations or of Section 306(e)'s standards of performance. Instead, it is Section 402 that requires that discharges of pollutants meet "all applicable requirements under sections [301] . . . [and 306]." *Id.* § 1342(a)(1). Congress affirmatively expressed its intent to impose different

requirements under the different permitting programs—compliance with Section 404(b)(1) guidelines under Section 404, and compliance with effluent restrictions (including standards of performance) under Section 402.

As this Court recently reiterated in another Clean Water Act case, "if 'Congress includes particular language in one section of a statute'"—as Congress did in Section 402, stating that Sections 301 and 306 apply under that section—"'but omits [that language] in another section of the same Act'"—as Congress did in Section 404—"'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *S.D. Warren*, 547 U.S. at 384 (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)). If concluding that Sections 301(e) and 306(e) do not apply under Section 404 is, as the Ninth Circuit characterizes it, a "negative inference," J.A. 531a, it is a negative inference expressly approved by this Court when construing the Clean Water Act.[4]

Moreover, the specific provisions of Section 404 are properly construed as creating an exception to the general obligations imposed by Sections 301(e)

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[4] The Ninth Circuit also thought Section 404(f) weighed against finding an exception in Section 404 from the requirements of Sections 301 and 306 because Congress insisted "in § 404(f) that even the discharges from the enumerated activities [for which there is an explicit exception] continue to be subject to effluent standards." J.A. 535a. Section 404(f), however, makes no mention of the effluent limitations or performance standards of Section 301(e) or Section 306(e), but instead specifically refers to a different set of standards—Section 307's "Toxic and pretreatment effluent standards," 33 U.S.C. § 1317—that are not at issue in this litigation. *See id.* § 1344(f).

and 306(e). It is well-established that "specific statutory language should control more general language when there is a conflict between the two." *Nat'l Cable*, 534 U.S. at 335; *see also Townsend v. Little*, 109 U.S. 504, 512 (1883) (explaining the "well-settled rule" that "general and specific provisions, in apparent contradiction . . ., may subsist together, the specific qualifying and supplying exceptions to the general"). The Ninth Circuit went out of its way to emphasize the broad language of Sections 301(e) and 306(e), describing these sections as imposing "blanket prohibitions" that apply to "*all*" and "*any*" discharges. J.A. 531a–32a. The court also specifically observed that, in contrast, "the permit scheme under § 404 is a *limited* permit program that applies *only* to dredged or fill material." *Id.* 530a–31a (emphases added). The court even relied, when addressing the allegedly conflicting regulations, on the canon of construction that the specific controls the general. *Id.* 548a (describing it as a "basic principle" of interpretation). The Ninth Circuit should have acknowledged, therefore, that to the extent the general prohibitions on discharges in Sections 301 and 306 appear to conflict with Section 404's specific exception that permits discharges of fill material as long as they comply with the water-quality requirements of Section 404(b)(1), Section 404 ought to control. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . ., particularly when the two are interrelated and closely positioned, both in fact being parts of" the same statutory scheme.).

Sections 404(p) and 402(k) confirm this reading of the statute. These parallel provisions immunize holders of Section 404 or Section 402 discharge per-

mits from enforcement actions and citizen suits based on the permitted discharge, providing that compliance with the terms of the discharge permit "shall be deemed compliance" with substantive provisions and restrictions imposed by the Clean Water Act—but only the substantive provisions that apply to each type of discharge. Section 404(p), on the one hand, states that "[c]ompliance with a permit issued pursuant to this section . . . shall be deemed compliance . . . with [Sections 301, 307, and 403]." 33 U.S.C. § 1344(p). Section 402(k), on the other hand, provides that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance . . . with [Sections 301, 302, *306*, 307, and 403]." *Id.* § 1342(k) (emphasis added). Each of these provisions, in other words, confirms that the holder of a Clean Water Act permit, by complying with the permit, is complying both with the general command of Section 301(a) that "the discharge of any pollutant . . . shall be unlawful" without a permit, *id.* § 1311(a), and with the specific requirements applicable under the respective permit program. *Compare id.* § 1344(b), (f), & (h)(1)(A) (showing that the Section 404(b)(1) guidelines and Sections 307 and 403 apply under Section 404), *with id.* § 1342(a) (requiring that Section 402 permits comply, "notwithstanding [Section 301(a)]," with "all applicable requirements" of Sections 301, 306, 307, and 403). Notably, Section 404(p) does not address requirements inapplicable under Section 404 (such as Section 306), just as Section 402(k) does not address requirements inapplicable under Section 402 (such as the Section 404(b)(1) guidelines).

b. The legislative history confirms that Congress intended for fill material to fall within the Corps' domain. The Senate bill originally proposed in 1972

to amend the existing Federal Water Control Act did not include a Section 404 or any program addressing discharges of fill material. *See* S. 2770, 92d Cong. §§ 402–501 (1971). When an amendment containing an early version of Section 404 (which addressed only dredged material, not fill material) was proposed, the bill's sponsor, Senator Muskie, opposed it on the ground that "[s]poil disposal is a pollutant" and that anyone wishing to dispose of spoil in navigable waters should be required "to get a permit from EPA or the State, just as would be required for other discharges." Senate Debate on S. 2770 (Nov. 2, 1971), *reprinted in* 2 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1388 (1972). Senator Muskie also objected that the proposed Section 404 would "shift the environmental evaluation authority from EPA to the Corps of Engineers." *Id.*

While that amendment failed in the Senate, an amendment proposed by the House included a Section 404 that proposed "a separate permit program for the discharge of dredged or fill material" and provided that "[t]his program would be administered by the Secretary of the Army, acting through the Chief of Engineers." S. Rep. No. 92-1236, at 141 (Conf. Rep.). The House version of Section 404, contrary to Senator Muskie's desire to have any and all discharges regulated by EPA, in fact provided that the Secretary of the Army "need not follow the designation of the [EPA] Administrator where the Secretary certifies there is no economically feasible alternative reasonably available." *See* Hearings on H.R. 11896 Before the H. Comm. on Public Works, 92 Cong. 308 (1971). Because the then-acting EPA Administrator "strongly oppose[d]" this version where permit grants would not be "subject to EPA review and concurrence

with respect to environmental considerations," *id.*, Section 404 was revised to provide EPA with a veto over the grant of a Section 404 permit. Senate Consideration of the Report of the Conference Committee (1972), *reprinted in* 1 U.S. CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 177 (1972) ("the Conferees agreed that the Administrator of the [EPA] should have the veto"); *see also* 33 U.S.C. § 1344(c). But even as Congress backed away from giving the Corps exclusive authority over such discharges, Congress retained the proposed Section 404 program administered by the Corps, under guidelines developed by EPA in consultation with the Corps. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884.

* * *

The Ninth Circuit's flawed construction of the Clean Water Act results directly from its cart-before-the-horse approach to statutory interpretation: The court started with the proposition that the two regulations potentially implicated by the discharge—that is, the froth-flotation effluent limitation and the regulation defining "fill material"—conflicted intractably and then interpreted the *Act* in light of those *regulations*. *See, e.g.*, J.A. 525a–26a ("Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern . . ., but they result in different interpretations of the Act."). If that were the law, then the promulgation of an EPA *regulation* setting out a new effluent restrictions on the discharge of rock, sand, and dirt (paradigmatic examples of fill material) could render meaningless a *statutory provision* (Section 404) and could negate Congress's clear intention to create a

Corps-administered permit program for discharges of fill material. Even without the EPA reaching that far, on the Ninth Circuit's view, the Section 404 permit program applies not to "fill material," but only to a residual subset of "fill material" not potentially implicated by any of the hundreds of effluent restrictions promulgated by EPA. *See* 40 C.F.R. subchapter N, pts. 400–71. But that is not the line EPA and the Corps drew in their notice-and-comment rulemaking defining the statutory term—in announcing its effects-based definition, EPA made clear that it "has *never* sought to regulate fill material under effluent guidelines," Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added)—and that line has not been challenged in this litigation.

II. The Ninth Circuit Erred By Rejecting The Corps' Construction Of Its Own Rule

It is well settled that a court must defer to an agency's construction of its own regulation—it has "controlling weight," *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)—unless that interpretation is "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The joint EPA-Corps Fill Rule defines "fill material" as "material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States" and provides that a "discharge of fill material" "includes . . . placement of . . . slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)(1)(ii) & (f). Even while admitting that the proposed mine tailings discharge "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake," J.A.

526a, the Ninth Circuit held that the Corps' interpretation was unreasonable because it was inconsistent with the "regulatory history," which it found "dispositive." *Id.* 547a. Based on its reading of the regulatory history, the Ninth Circuit ascribed to the promulgating agencies an intent to apply their Fill Rule to "*only* . . . those tailings and other mining-related materials that are not subject to effluent limitations." *Id.* 546a (emphasis added). The Ninth Circuit erred both in its methodology and its conclusion. The Corps' interpretation of its Fill Rule (with which EPA concurred) was compelled by its text, amply supported by its history, and consistent with the Corps' historical treatment of mine tailings.

A. The Ninth Circuit Disregarded The Text Of The Fill Rule

The court of appeals began its regulatory analysis with the history of the Fill Rule. By relying on selected excerpts from the regulatory history, the Ninth Circuit appears to have adopted the position that an agency construction that is consistent with the *text* of the regulation may nonetheless be rejected as unreasonable if an examination of the regulatory *history* demonstrates that the text does not accurately reflect the agency's regulatory intent. *See* J.A. 535a ("Although the plain language of the Clean Water Act resolves the apparent regulatory conflict at the heart of this case, the regulatory history further demonstrates . . . .").

This is clearly wrong. The starting point for regulatory interpretation is the text itself—not the regulatory history—and "if the meaning of the words used is in doubt," "a court must necessarily look to the administrative construction of the regulation." *Seminole Rock*, 325 U.S. at 414. The "*only* tools,

therefore, are the plain words of the regulation and any relevant interpretations of the [relevant agency]." *Id.* (emphasis added).

In *United States v. Locke*, 471 U.S. 84 (1985), this Court explained that where statutory language "is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found 'sufficiently unreasonable' as to be unacceptable." *Id.* at 96. The analysis of *Locke* applies with even greater force when, as here, an agency is construing not a statute but its own regulation; it is in that context that courts owe maximum deference to an agency's interpretation. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (explaining that "this Court shows great deference to the interpretation given [a] statute by the . . . agency charged with its administration" and that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"); *see also Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to *further deference* when it adopts a reasonable interpretation of regulations it has put in force.") (citation omitted and emphasis added). Having conceded that the agencies' construction "facially meets" the joint Fill Rule, J.A. 526a, the court of appeals had no authority to set that interpretation aside. *See Locke*, 471 U.S. at 96.

Under *Seminole Rock* and *Auer*, the Ninth Circuit was required to interpret the Fill Rule by turning first to its text and then to the agencies' interpretation of their own regulation. The plain language of the Fill Rule defined "fill material" as any material

that "[c]hang[es] the bottom elevation of any portion of a water of the United States" and defined "discharge of fill material" to include "slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(e)(1)(ii) & (f). The Corps' issuance of a permit for the proposed discharge of a mine tailings slurry into Lower Slate Lake where it would have the effect of "rais[ing] the bottom elevation of the lake by 50 feet" is indisputably consistent with the Fill Rule's text. J.A. 519. The Ninth Circuit's acknowledgement that the proposed discharge "facially meets the Corps' current regulatory definition of 'fill material,'" J.A. 526a, therefore ought to have been both the beginning and the ending of the court's analysis.

B. The Regulatory History Confirms That Effluent Restrictions Do Not Apply To Discharges Of Fill Material, Including Mine Tailings

To determine whether the agencies reasonably could conclude that Coeur's proposed discharge of mine tailings was encompassed by the definition of "fill material" set out in the Fill Rule, the Ninth Circuit did not need to—and therefore lacked the authority to—look beyond the text of the Fill Rule itself. *See Seminole Rock*, 325 U.S. at 414. But even the "regulatory history" confirms that the agencies reasonably interpreted their regulation when they concluded that Coeur's proposed tailings slurry was "slurry, or tailings or similar mining-related materials" embraced within the definition of "discharge of fill material." 33 C.F.R. § 323.2(f).

The Ninth Circuit concluded that the Fill Rule applies to "*only* . . . tailings and other mining-related materials . . . not subject to effluent limitations," J.A. 546a (emphasis added), but the regulatory history

states that "[t]he language in today's final rule will clarify that *any mining-related material* that has the effect of fill when discharged will be regulated as 'fill material.'" Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added). The Ninth Circuit quoted statements in the regulatory history indicating that the agencies "did not intend to change their longstanding practice," J.A. 542a, but ignored the agencies' explanation of what that practice was: The agencies confirmed that the rule would "maintain [their] existing approach to regulating pollutants under *either* Section 402 *or* 404," that "[e]ffluent limitation guidelines and new source performance standards . . . are incorporated into permits issued under section 402 of the Act," that the Fill Rule would "not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs," and that "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphases added). The agencies even specifically addressed the type of discharge at issue here, noting that the words "slurry, or tailings or similar mining-related material" were added to the Fill Rule to "clarify that *any mining-related material* that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* (emphasis added).

Statements the agencies made in 2002 when responding to comments on a draft version of the Fill Rule further demonstrate the agencies' longstanding practice of applying effluent restrictions only under Section 402, not Section 404, and of regulating mining-related materials, such as tailings, under Section 404. The agencies noted that "mining by-products"—such as tailings—"resulting from mining beneficiation or the processing of mined materials" "may

have a slightly different physical form from the traditional rock and soil used as fill material, but [they] can have the same effect on the aquatic environment as those materials." J.A. 92a–93a. The agencies accordingly declared that where the discharge of mining by-products "will result . . . in . . . a change in the bottom elevation," it "clearly qualif[ies] as 'fill material' under this rule" and "will be regulated by the Corps under section 404 of the Act." *Id.* 93a. This statement echoes an earlier EPA statement, made in 1977 when EPA's Acting Administrator testified in a letter to Congress, that discharges of fill material *from mining operations* were regulated under Section 404: "Where mining requires . . . in-stream sediment control impoundments that involve discharges of material into water, individual and general [Section 404] permitting procedures are applicable." H. Rep. No. 95-139, at 62 (1977) (testimony about Section 404 during consideration of 1977 amendments to the Clean Water Act).

Indeed, when drafting the current Fill Rule, the agencies specifically considered and rejected a provision that would have had the same effect as the Ninth Circuit's ruling. The proposed version of the Fill Rule contained a provision that would have expressly excluded discharges governed by effluent restrictions from qualifying as fill material: "The term fill material does not include discharges covered by proposed or final effluent limitations guidelines and standards . . . ." Proposed Revisions, 65 Fed. Reg. at 21,299. The agencies, however, deleted this provision from the final Fill Rule. Final Revisions, 67 Fed. Reg. at 31,135 ("[T]oday's final rule also deletes the exclusion contained in the proposal for discharges covered by effluent limitation guidelines or standards or NPDES permits."). Rather than recog-

nizing this as evidence that the Fill Rule does not contain the exclusion, *see* J.A. 544a–45a, the Ninth Circuit reinserted that precise exclusion: "[T]he current fill rule only applies to those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance." *Id.* 546a; *compare id.*, *with* 33 C.F.R. § 323.2(e) & (f). But it is the version of the rule that was actually promulgated that controls, not the discarded draft. In fact, in 1985 this Court reversed a court of appeals that similarly rewrote a regulation defining a phrase ("waters of the United States") from the precise statute at issue here—Section 404 of the Clean Water Act. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court noted that the "history of the regulation underscore[d] the absence of [a particular requirement]" and concluded that the court of appeals, by "fashioning its own requirement," "improperly reintroduced into the regulation precisely what the Corps had excised." *Id.* at 130; *cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) ("when Congress deletes limiting language, 'it may be presumed that the limitation was not intended'" (quoting *Russello v. United States*, 464 U.S. 16, 23–24 (1983))).

Against all this, the Ninth Circuit latched onto selected snippets from the regulatory history in order to conclude that the "Corps' application of the fill rule in this case . . . contradicts its interpretation at the time the regulation was promulgated." J.A. 536a. But the statements that the Ninth Circuit relied on, *see id.* 542a–46a, support the court's analysis only if the agencies believed that mine tailings were not fill material—an assumption that is clearly false, *see* 33 C.F.R. § 323.2(f). Indeed, the statement that the Ninth Circuit found particularly compelling—

that "'if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] *under specific circumstances*, then that determination remains valid,'" J.A. 545–46a (quoting J.A. 48a) (some emphasis removed)—does not state a general rule, as the court would have it, that all mining-related materials are subject to effluent restrictions even if they have the effect of fill. Quite the contrary, it suggests only a limited exception to the rule the agencies stated in the preceding sentence of the regulatory history—that "the placement of 'overburden, slurry, or tailings or similar mining-related materials' is considered a discharge of fill material" and "is regulated under Section 404," *id.* 48a. That limited exception applies, as the agencies expressly noted, only in "specific circumstances" (for example, to effluent discharges *from* tailings impoundments or other settling ponds, or when EPA vetoes a Section 404 permit), not across the board.

C. The Corps Has Long Regulated Discharges Of Mine Tailings As Fill Material

SEACC, seeking to portray this case as "a one-time departure from long established practice," has contended that from 1982 "until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill—or from any other source subject to EPA effluent limitations—into navigable waters." SEACC Opp. to Cert. Pet. 1–2. To the contrary, the Corps (in conjunction with EPA) has repeatedly, as the following examples from the 1980s, 1990s, and 2000s show, authorized Section 404 permits for mine tailings even when an EPA effluent limitation existed that could have applied—had the discharge not qualified as fill material—because of the processes used at the mines.

The Corps' interpretation of the Fill Rule is consistent with longstanding practices concerning the disposal of mine tailings, practices that have created settled expectations in the regulated community. As early as 1886, Congress directed that "the Secretary of the Army" may authorize "deposits of debris of mines" in navigable waters "where harbor-lines have not been established." 33 U.S.C. § 407a. And in 1977, as noted earlier, EPA's Acting Administrator testified to Congress that discharges of fill material from mining operations were regulated under Section 404: "Where mining requires . . . in-stream sediment control impoundments that involve discharges of material into water, individual and general [Section 404] permitting procedures are applicable." H. Rep. No. 95-139, at 62.

The Red Dog Mine in northwest Alaska—the largest zinc mine in the world—is an open-pit mine that uses a froth-flotation process to produce lead and zinc. C.A. J.S.E.R. 836. Since 1982, two effluent restrictions—one of which is the froth-flotation standard of performance at issue here—have been in place and could have been applied to the mine. *See* 40 C.F.R. § 440.102(a) (promulgated at Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598, 54617–18 (Dec. 3, 1982)) (effluent limitation for "mine drainage" for mines using "open-pit . . . operations"); *id.* § 440.104(b)(1) (promulgated at 47 Fed. Reg. at 54,619) (performance standard for "mills that use the froth-flotation process"). In its Final Environmental Impact Statement for the Red Dog Mine, EPA explained that a "[t]hickened tailings slurry from the mill concentrating process" would be fed "into the tailings pond." C.A. J.S.E.R. 1097. Despite the presence of effluent

restrictions relating to the mill source and despite observing that "the liquid portion" of the slurry "from the mill concentrating process" would "consist[] of excess *process water*," *id.* (emphasis added), the Corps granted a Section 404 permit in 1985 that authorized, to quote the permit itself, the discharge of "*mine tailings* in the south fork of Red Dog Creek," *id.* 979 (emphasis added).

The Fort Knox Mine is "an open pit gold mine near Fairbanks, Alaska." C.A. J.S.E.R. 983. The effluent limitation for open-pit mining mentioned above also applied to "mine drainage from mines," such as the Fort Knox Mine, "operated to obtain . . . gold bearing ores." 40 C.F.R. § 440.102(a). Despite the potentially applicable effluent limitation, the Corps in 1994 granted a Section 404 permit to the mine for the discharge of approximately 4.5 million cubic yards of "fill material into approximately 103 acres of waters of the United States" for a tailings impoundment. C.A. J.S.E.R. 983–86, 989; *see also id.* 985 (referring, in the conditions section of the permit, to the discharge of "tailings into the tailings impoundment").

Over the last twenty years, the Corps has also repeatedly reauthorized a nationwide permit for coal mining notwithstanding the existence of a related effluent restriction. In 1982, the Corps issued Nationwide Permit No. 21, which authorizes "discharges associated with surface coal mining activities." Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,833 (July 22, 1982). The Corps has continued reauthorizing this national Section 404 permit since 1982, *see, e.g.*, Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,184 (Mar. 12, 2007), despite the fact that

effluent restrictions have existed since 1985 for "discharges from any coal mine at which the extraction of coal is taking place or is planned to be undertaken and to coal preparation plants and associated area," 40 C.F.R. § 434.10 (promulgated at Coal Mining Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 50 Fed. Reg. 41,296, 41,305 (Oct. 9, 1985)). This nationwide permit authorizes discharges when "the district engineer makes a determination that the individual and cumulative adverse effects on the environment from such . . . discharges are minimal." Interim Final Rule, 47 Fed. Reg. at 31,833.

These examples demonstrate that for the past 23 years, the Corps has repeatedly authorized (and EPA has not vetoed) Section 404 permits for mining-related discharges when effluent restrictions existed—including the very performance standard at issue here—that could have been applied to the discharges. The agencies granted these Section 404 permits even in instances when "process water" was mixed in with the tailings. C.A. J.S.E.R. 1097. Indeed, an EPA memorandum written in 2004 to explain its regulatory approach to discharges of mine tailings used the Kensington mine as an example of how to apply the Fill Rule "to other comparable mining proposals." J.A. 142a n.1 (entitled "Clean Water Act Regulation of Mine Tailings"). The "Mine Tailings" memorandum states that EPA "believe[s] that the text of the rule makes clear that mine tailings placed into impounded waters of the U.S., as proposed by the Kensington mine project, are regulated under section 404 of the CWA as a discharge of fill material." *Id.* 144a. In fact, the "Mine Tailings" memorandum expressly recognized that "the regulatory regime applicable to discharges under section

402, including effluent limitation guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. pt. 440, subpt. J), do[es] not apply to the placement of tailings into the proposed impoundment." *Id.* 144a–45a (citing 40 C.F.R. § 122.3(b) ("Discharges of . . . fill material . . . which are regulated under section 404" "do not require [EPA] NPDES permits."")). As EPA wrote in promulgating the Fill Rule, "EPA has *never* sought to regulate fill material under effluent guidelines." Final Revisions, 67 Fed. Reg. at 31,135 (emphasis added).

* * *

The court of appeals' refusal to defer to the agencies' interpretation of their own joint regulation wrested from the Corps and EPA the authority Congress delegated them to draw the line separating discharges of fill material from discharges of all other pollutants. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[T]the power authoritatively to interpret its own regulations is a component of [an] agency's delegated lawmaking powers."). By substituting its policy preferences for those of the agencies charged with administering the Clean Water Act, the Ninth Circuit contravened this Court's guidance that Congress expects agencies' to make "substantive choices" when it "leaves the intersection of competing objectives . . . imprecisely marked." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002); *see also Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (agency interpretations that resolve "fundamental ambiguit[ies]" resulting from "differing mandates" in statutory texts by developing a "'reasonable interpretation' of the statutory scheme" are "entitled to deference"). And even aside

from the Ninth Circuit's lack of authority to make such policy judgments, there is no reason to think that the Ninth Circuit is better equipped than Congress, EPA, or the Corps—let alone all three—to decide how to balance interests in protecting the environment against interests in using natural resources, including "economic values" and "mineral exploitation." 33 U.S.C. § 1343(c) (setting out guidelines cross-referenced in Section 404(b)(1)).

CONCLUSION

The Ninth Circuit erred at each step of the way. Ignoring the structure and history of the statute, the court read the word "and" to require compliance with mutually exclusive provisions. It discounted the fact that Congress specifically enumerated different requirements and permitted general statutory provisions to trump specific ones. Refusing to defer to the agencies' construction of a regulation they drafted jointly, the court of appeals also made no attempt to reconcile its interpretation with the plain text of the Fill Rule. Instead, it searched the regulatory history for scattered phrases that could be construed to support SEACC's position, mischaracterized the approach consistently taken by the agencies for decades, and then wrote into the Fill Rule an exception the agencies specifically rejected.

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

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